# SUPREME COURT OF NOVA SCOTIA

**Citation:** Martin v. Roman Catholic Diocese of Antigonish, 2009 NSSC 331

**Date:** 2009/09/10
**Docket:** Hfx 297827
**Registry:** Halifax

**Between:**

Ronald Martin

Plaintiff

v.

Raymond Lahey in his capacity as Bishop of the Roman Catholic Diocese of Antigonish and The Roman Catholic & Episcopal Corporation of Antigonish commonly known as the Roman Catholic Diocese of Antigonish

Defendants

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| **Judge:** | The Honourable Justice A. David MacAdam |
| **Heard:** | September 10, 2009, in Halifax, Nova Scotia |
| **Written Decision:** | November 6, 2009 |
| **Counsel:** | John McKiggan and Russell Raikes, for the Plaintiff<br>Bruce MacIntosh and Ward Branch, for the Defendants |

**By the Court:**

## INTRODUCTION

[1] The Plaintiffs seek an Order, on consent, (1) conditionally certifying an action as a class proceeding pursuant to sections 6 and 7 of the *Class Proceedings Act*, S.N.S. 2007, c. 28, and (2) approving a Settlement Agreement negotiated by the parties.

## BACKGROUND

[2] The action involves a claim for damages arising from sexual assaults by priests of the Diocese of Antigonish. Mr. Martin is the proposed Representative Plaintiff for the class, which is defined as "all individuals who were sexually assaulted by a priest of the Diocese of Antigonish between 1950 and September 10, 2009, including the Estates of all such persons now deceased." The present action was commenced on June 24, 2008, after several years of investigation, litigation and negotiation respecting individual claims on account of sexual assaults allegedly committed by Father Hugh Vincent MacDonald. The parties to the class action have reached a settlement, for which they seek the approval of this Court.

[3] The Plaintiff alleges that the Defendants – the current Bishop and the Diocese – are directly and vicariously liable for sexual assaults committed by priests of the Diocese. The Amended Statement of Claim includes claims for systemic negligence, infliction of mental distress, breach of trust, fraud, breach of non-delegable duty and breach of fiduciary duty. The Plaintiff alleges that as a result of the sexual assaults, he and other Class Members suffered serious, lasting and permanent physical, mental, psychological and economic injuries.

**THE SETTLEMENT AGREEMENT**

[4] The parties submit that the proposed settlement provides significant benefits to class members. An expedited, confidential claims process has been established, through which individual class members may claim compensation on account of sexual assaults. The settlement establishes a Damages Fund of $12 million, secured by a floating debenture covering the real property of the Diocese. The Defendants will pay up to $400,000.00 for future psychological counselling for successful claimants. Expenses of the claim process will be paid by the Defendants. The Defendants will pay into a Taxable Costs Fund for costs awarded to individual claimants. The claims process is subject to ongoing supervision of

this Court. The Settlement provides a release to the Defendants with respect to all claims by class members except those who opt out.

[5] The Settlement Agreement is subject to two conditions. First, if there are any opt-outs, the Defendants will have the right to elect, within 70 business days of the conditional certification order, not to proceed with the settlement. Second, if more than 70 Class Members identify themselves to Class Counsel, whom Class Counsel believe are *bona fide* Class Members, then Class Counsel may elect, within 70 business days of the conditional certification order, not to proceed with the settlement. If either condition is met, the party for whose benefit it was included must elect whether to waive it. If the conditions are not met, or if either party waives the conditions, the settlement and certification are final and binding. If the parties do not waive the conditions, the settlement and conditional certification are voided as if they had never occurred and the parties will revert to the litigation that existed before the settlement.

[6] The claims process under the Settlement Agreement requires claimants to complete claim forms for delivery to defence counsel within six months of the Order approving the settlement, with a possible six-month extension in exigent

circumstances with leave of this Court. There will be exchange of relevant documents between the Defendants and the claimants, who may be examined by defence counsel under oath for up to two hours. There is provision for calling witnesses and for joint medical/psychological examination. The parties agree to retain a joint economic expert to quantify claimants' economic losses.

[7] If a claim cannot be settled by agreement, a retired judge of this Court will determine whether the claimant was sexually assaulted and, if so, determine the claimant's entitlement to damages, including general damages, economic loss and psychological counselling. Any such hearing is subject to the parties' obligation to meet and attempt to settle. Validation hearings will be inquisitorial, with questioning only by the judge and no cross-examination of the claimant. The judge will issue a written decision, which is subject to appeal to this Court. The parties have agreed to select six "test cases" to advance through the claims process in order to establish a range of damages. The judge will conduct a legal fee review after any hearing where compensation is awarded.

[8] The Settlement Agreement contemplates that compensation will be paid on an interim with final distribution on application to the Court. It is possible that

individual awards could be reduced on a *pro rata* basis, depending on the number of claimants and the amounts awarded. The Settlement Agreement provides that non-Catholic victims will receive awards at 75 per cent of what would be awarded to Catholic members on the basis that there is no vicarious liability for assaults against non-Catholics.

[9] Among the benefits that the settlement process is said to offer are the waiver of some defences – such as limitation periods and denial of vicarious liability – by the Defendants; the relaxation of the standard of proof where there is a criminal conviction or where a criminal charge did not proceed due to the death of the accused; the privacy, confidentiality and speed of the process; the less adversarial nature of the process (as compared, presumably, with a court proceeding); and the encouragement the process offers for the settlement of claims.

[10] The ongoing administration of the Settlement Agreement is subject to review by this Court. The Agreement also requires reporting to the Court at fixed intervals.

[11] The proposed Settlement Agreement incorporates a Litigation Plan, which proposes the certification of a number of common issues, followed by the determination of individual issues, such as damages, by individual hearings before the agreed-upon retired judge, as directed by the Court.

**CLASS CERTIFICATION**

[12] The proposed Representative Plaintiff, Mr. Martin, has stated in his affidavits that he is aware of his obligations as a Representative Plaintiff, that he is prepared to fulfill those obligations on behalf of the Class and that he is unaware of any conflict of interest which would prevent him from acting as the Representative Plaintiff.

[13] Mr. Martin filed an application for certification of this action as a class action under the *Class Proceedings Act* in December 2008. The Settlement Agreement was concluded on August 4, 2009. Under the Settlement Agreement (whose essential terms are set out above), the parties agree that the Plaintiffs will apply to this Court, on consent, for certification of the action as a Class Proceeding and approval of the Settlement Agreement. Certification is conditional upon the

non-exercise of the parties' respective elections not to proceed and waiver provisions.

**ISSUES**

[14] This application raises two issues: (1) Whether the action should be certified as a class proceeding pursuant to ss. 6 and 7 of the *Class Proceedings Act*, and (2) whether the settlement is fair, reasonable and in the best interests of the Class as a whole.

**LAW**

[15] The goals of class proceedings legislation are judicial economy, access to justice and deterrence or behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, [2000] S.C.J. No. 63, at paras. 27-29.

[16] The *Class Proceedings Act* permits plaintiffs (s. 4) and defendants (s. 5) to apply for certification of a class proceeding. Section 6 provides for certification as a condition of a settlement, and recognizes the concept of a "settlement class:

> Where as a condition of settlement between a plaintiff and a defendant certification of a proceeding as a class proceeding is being sought in order that the settlement will bind the class members, the class members constitute a settlement class.

[17] There is authority that the requirements for certification "need not ... be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed": *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (Ont. S.C.J.), at para. 27.

[18] Subsection 7(1) of the Act sets out the test for certification of a class proceeding. It provides:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> > (a) the pleadings disclose or the notice of application discloses a cause of action;

> (b) there is an identifiable class of two or more persons that would be represented by a representative party;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> (e) there is a representative party who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
> >
> > (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[19] If these five conditions are met, the Court must certify the class proceeding. In determining, pursuant to s. 7(1)(d), that a class proceeding is the preferable procedure, ss. 7(2) sets out several considerations:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider

> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

[20] Subsection 7(3) confirms that approval of a settlement precedes certification of a class proceeding in an application under section 6:

> (3) Notwithstanding subsection (1), where an application is made to certify a proceeding as a class proceeding in order that a settlement will bind the members of a settlement class, the court shall not certify the proceeding as a class proceeding unless the court approves the settlement.

[21] A certification order may be amended (s. 11(4)). Moreover, the proceeding may be decertified (or the Court may make "any other order it considers

appropriate") if the Court is of the view that the conditions of section 7 are not satisfied after the certification order is made.

[22] Certification is not a decision on the merits of the claim. It is a procedural matter: *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at 743. Rather than the merits, the certification stage "focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action": *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, [2001] S.C.J. No. 67, at para. 16. The evidentiary base required for certification was discussed in *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379, [1998] O.J. No. 2694 (Ont. C.J. (Gen. Div.)), a decision under the Ontario *Class Proceedings Act*, at para. 4:

> In my view, s. 5 of the CPA requires the representative plaintiff to provide a certain minimum evidential basis for a certification order. The CPA clearly does not contemplate a detailed assessment of the merits of the claim of the representative plaintiff or of the claims of the members of the proposed class. That is clear from s. 5(5). However, it is my view that in order to certify the proceedings, the judge must be satisfied of certain basic facts required by s. 5 of the CPA as the basis for a certification order. The matter comes before the court on motion. I fail to see why the moving party should be relieved of the normal burden of providing the court with a factual record sufficient to ground the relief sought. While the point raised here has not been the subject of judicial determination, other courts have spoken of the need for an evidential basis for the certification motion: see eg *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314, esp. at 318-19. At a minimum, the court must be satisfied that there is a class of more that one person and that the issues raised by the members of the

> class satisfy the requirement that they raise common issues, and that a class proceeding would be the preferable procedure for the resolution of the common issues. In most class proceedings, these factual matters may well be obvious and require little evidence. Most class proceeding arise from situations where the fact of wide-spread harm or complaint is inherent in the claim itself. Obvious examples are claims arising from mass disasters such as subway or air crashes or claims based on allegations of harm from wide-spread pollution. I do not say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. I do say, however, that there must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess of the nature of those claims that exist that will enable to court to determine whether the common issue and preferability requirements are satisfied.

[23] There is, then a necessity for a minimal evidentiary base before a class proceeding is certified.

[24] Co-counsel for the defendant, Ward Branch, has written a text titled *Class Actions in Canada* (Canada Law Book, looseleaf, updated July 2009). Although this book was not referenced by either party on the application, I note that Mr. Branch observed, at paras. 4.1530-1540:

> 4.1530 While it is not proper to determine the merits of the case on the certification application, this principle should not artificially limit the court's examination of the factors necessary for a reasoned determination of whether a plaintiff has met the burden. As the court stated in *Castano v. American Tobacco Co.* [84 F.3d 734 (5th Cir. 1996)]:
>
> > Going beyond the pleadings is necessary, as a court must understand the claims, defences, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.

> 4.1540 Evidence that touches on the merits of the case need not be excluded from the supporting affidavits so long as it touches on relevant factors to certification. Indeed the court must have a good sense of all of the issues that will be raised in order to foresee the future conduct of the litigation. Without a complete presentation, the court will be unable to assess manageability or preferability. However, in *Andersen v. St. Jude*, [[2003] O.J. No. 4314] the court noted that excessive amounts of evidence could be the basis for an adverse cost order. Furthermore, the court held that it was inappropriate to ask the court at the certification stage to choose between conflicting expert opinions with respect to the correct resolution of those issues. Evidence of the existence of parallel class proceedings in other jurisdictions may be admitted, as it is some evidence that other persons have a similar problem.

## THE FACTORS UNDER S. 7(1)

### *Cause of action*

[25] There is authority to the effect that the test for determining whether "the pleadings disclose or the notice of application discloses a cause of action" as required by s. 7(1)(a) is whether the pleading would survive a motion to strike for failure to disclose a cause of action: *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.) at para. 36. The test, as described

in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, 1990 CarswellBC 216, is "assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action?" (para. 36).

[26] Mr. Branch, after noting (at para. 4.60) that the test is "very similar to those provisions in the rules of court in Ontario and B.C. permitting the dismissal of a proceeding that does not disclose a cause of action," goes on to state, at paras. 4.60 and 4.70:

> ... A similar test is applied, the only difference being that the onus to show a cause of action falls upon the party bringing the class action, as opposed to the party challenging the proceeding.
>
> 4.70 The court will presume the facts alleged in the pleadings are true, and will determine whether it is plain and obvious that no claim exists. This is not a preliminary merits test. As Mr. Justice Winkler stated in *Edwards v. Law Society of Upper Canada* [[1995] O.J. No. 2900 (S.C.)]:
>
> > There is a very low threshold to prove the existence of a cause of action ... the court should err on the side of protecting people who have a right of access to the courts.

[27] Mr. Branch goes on to observe, at paras. 4.80, 4.105 and 4.107:

> 4.80 Courts in B.C. have also adopted a low threshold for this requirement. The Statement of Claim is read as generously as possible, and as it might reasonably be amended, to accommodate inadequacies due solely to drafting deficiencies.
>
> ...
>
> 4.105 In Saskatchewan, the Court of Appeal has rejected the "plain and obvious" test for determining the cause of action requirement. Instead, plaintiffs in that province must prove an "authentic or genuine cause of action". According to this standard, plaintiffs must satisfy the court that there exists a plausible basis in principle and presumed fact for supposing that the defendants could be held liable. In *Bartolome v. Mr. Payday Easy Loans Inc.*, [2007 BCSC 132] the British Columbia Supreme Court questioned whether this formulation of the test produces any practical differences in results. The court refused to adopt the Saskatchewan version of [the] test, noting that this supposed reformulation was, in essence, the "plain and obvious" test.
>
> 4.107 In Manitoba, the courts also have adopted a low threshold for this requirement, but so far the Manitoba Court of Appeal has declined to decide whether the applicable test is that adopted in Saskatchewan or the "plain and obvious" test.

[28] To similar effect, in *Grimmer v. Carleton Road Industries Assn.*, 2009 NSSC 169, the Nova Scotia Supreme Court applied the "plain and obvious" test in an application to strike pleadings (paras. 14-19).

[29] Also noted by Mr. Branch is the decision of the Ontario Superior Court of Justice in *CSL Equity Investments Ltd. v. Valois* (2007), 60 C.C.P.B. 8, 2007 CarswellOnt 2521, at para. 5, to the effect that where an application is made in the

context of a settlement, and the certification is by consent, the five criteria for certification will be “less rigorously applied than in the context of litigation.”

[30] As was observed in *Bartolome*, *supra*, it is therefore unnecessary to decide whether the formulation of the test by the Saskatchewan Court of Appeal is effectively any different than the “plain and obvious” test.

[31] The Plaintiff submits that the Amended Statement of Claim discloses causes of action in negligence, breach of fiduciary duty, breach of non-delegable duty, battery and intentional infliction of mental suffering. The only requirement is to establish that there is a cause of action. I am satisfied that in these circumstances the Plaintiff has satisfied the first of these criteria. I note that a finding that “a cause of action” exists does not have the effect of dismissing causes of action upon which no specific finding is made. The statute only requires that a single cause of action be made out on the pleadings.

***Identifiable class***

[32] Paragraph 7(1)(b) requires that there be "an identifiable class of two or more persons that would be represented by a representative party." In *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 (Ont. C.J. (Gen. Div.)), the Court said, at para. 10:

> The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.

[33] In *Dutton*, the Supreme Court of Canada said, at para. 38:

> Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria....

[34] In *Hollick,* the Supreme Court of Canada provided additional comments on the concept of an "identifiable class," at para. 17:

> ... The respondent does not dispute that the appellant's statement of claim discloses a cause of action. The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b) [of the Ontario *Class Proceedings Act*]....

[35] Certification cannot be denied by reason only that “the number of class members or the identity of each class member is not ascertained or may not be ascertainable”: *Class Proceedings Act*, s. 10(d). In this case, the Applicant submits that the evidence discloses that there are a substantial number of individuals who were victims of sexual assault by priests of the Diocese; for example, there are criminal convictions against three priests. Further, the Applicant submits that the class definition will permit a person to identify whether they fit into the class. The Plaintiff has, therefore, also satisfied the second criteria.

***Common issues***

[36] The Act defines “common issues” at s. 2(e), as follows:

> (e) "common issues" means

> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts....

[37] In *Carom v. Bre-X Minerals Ltd.* (2000), 196 D.L.R. (4th) 344, 2000 CarswellOnt 3838, the Ontario Court of Appeal made the following comments about an identical definition in the Ontario legislation, at paras. 40-41:

> The observation I would make about this definition is that it represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high. The important procedural objectives of the CPA, namely promoting access to justice and judicial economy, would not be realized if there was a requirement that the prospective plaintiffs in a class action present absolutely identical issues of fact or law.
>
> Second, the courts have also been wary of setting the bar too high on the common issues factor. In many cases, the Ontario courts have stated explicitly that certification should be ordered if the resolution of the common issues would advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of particular legal claims in the action, is not required. In *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1 (B.C. C.A.), Cumming J.A. said, at p. 18:
>
> > When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every

> defendant would make class proceedings with more than one defendant virtually impossible.

[38] Thus, the common issues need not determine liability, but only "move the litigation forward." The Applicant submits that the settlement "effectively resolves many of the common issues which the Plaintiffs sought to certify...." These include the existence of a duty of care, a fiduciary duty and a non-delegable duty, and whether the Defendants are directly or vicariously liable for sexual assaults by priests in the Diocese.

[39] The Settlement Agreement requires individual claimants to testify about the assaults that are said to constitute breaches of the alleged duties, leading to the damages they are alleging. As such, the Applicant says, the Settlement disposes of common issues, and thus eliminates the need for litigation that would arise if the action were certified and proceeded on a contested basis.

[40] In *Class Actions in Canada*, Mr. Branch states, at para. 4.670:

> 4.670 A single common issue is sufficient to satisfy this requirement. The common issues need not advance each of the causes of action raised in the pleading, so long as they relate to one of the causes of action.... It is not necessary that everyone in the class shares the *same* interest in the resolution of an asserted

> common issue, only that each member has *an* interest in the resolution of the common issue. [Emphasis in original.]

[41] Clearly, in view of the settlement of a number of issues, the Plaintiff has established this criterion.

***Preferable procedure for a fair and efficient resolution***

[42] Paragraph 7(1)(d) requires the court to be satisfied that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute." According to the Supreme Court of Canada in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69, [2001] S.C.J. No. 39, at para. 35:

> The inquiry is directed at two questions: first, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, whether the class proceedings would be preferable "in the sense of preferable to other procedures" (*Hollick*, at para. 28).

[43] The *Class Proceedings Act* provides, at s. 7(2):

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider

> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

[44] The Applicant submits that approval of the Settlement Agreement and the certification of the class would provide the preferable procedure, for several reasons:

> (a) The settlement resolves or eliminates issues which might otherwise have to proceed to trial on a contested basis;
>
> (b) It significantly advances the timetable for the determination of individual issues;

(c) It eliminates the risk of a contested certification hearing;

(d) It provides members of the Class with a confidential process in which very personal and painful claims may be asserted;

(e) It provides a more expeditious and less adversarial method for the validation of claims and quantification of damages;

(f) If the action were not certified and individuals were required to pursue individual actions, such actions would be more expensive, more adversarial, and more time consuming;

(g) This confidential process is more likely to encourage victims of these sexual assaults to come forward for compensation;

(h) The majority of class members who have retained counsel to date have engaged class counsel and support a class proceeding;

(i) The issues which are resolved by this settlement are material and do advance this litigation;

(j) The claims process in the Settlement Agreement is a reasonable one and is subject to ongoing supervision.

[45] The Applicant further submits that the certification of the class proceeding would meet the objectives of judicial economy and access to justice, for the following reasons:

(a) The settlement avoids a contested certification motion and resulting appeals;

(b) The settlement avoids a common issues trial which would only take place after extensive examinations for discovery and production of documents. That trial would likely last 6-10 weeks;

(c) The Defendants bear the expense of the claims process which relieves the Court of the burden of determining individual issues following the common issues trial;

(d) If the action is not certified, the Court faces the prospect of dozens of individual actions

(e) The Diocese does not have unlimited resources. By proceeding in this manner, it avoids a race between class members to obtain judgment in advance of the Diocese declaring bankruptcy;

(f) The settlement process dispenses with some defences that would be advanced by the Diocese in a common issues trial or individual actions;

(g) The claims process is designed to be less time consuming and less costly;

(h) The claims process has confidentiality safeguards that more likely to safeguard the privacy of the individual claimants than the regular court system; for example, the hearings are private and are not conducted in a public forum such as a court house;

(i) These safeguards for confidentiality make it more likely that those who were sexually assaulted will come forward;

(j) But for a class proceeding, many victims would not be psychologically or financially able to bear the rigours of ordinary litigation.

[46] The Applicant also submits that the fact of the settlement and the resulting publicity will hopefully serve as a deterrent to other organizations and entities, so as to prevent such abuses from occurring in the future.

[47] Citing *Harrington v. Dow Corning Corp.* (2000), 82 B.C.L.R. (3d) 1 (B.C.C.A.), at para. 23, Mr. Branch observes, at para. 4.670, that "if the impact of the resolution of the single common issue is limited, the court may find that the class action is not the preferable procedure to resolve the dispute (which is the next element of the test)."

[48] In this case, the settlement resolves the common issues, and for the reasons outlined by the plaintiffs' counsel, the "preferable procedure for a fair and efficient resolution."

***Representative party***

[49] The court is next required to be satisfied, pursuant to s. 7(1)(e) that there is a representative party who

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[50] The Supreme Court of Canada said in *Dutton*, at para. 41:

> [T]he class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class....

[51] The proposed Representative Plaintiff, Mr. Martin, submits that he was sexually abused as a child by Father Hugh Vincent MacDonald, as was his brother, who subsequently committed suicide. He says he has “steadfastly advanced his desire to see justice for those who were victimized by priests of the Diocese of Antigonish. He has retained experienced and capable counsel to act on his behalf and that of the class. He has familiarized himself with his obligations as the

Representative Plaintiff and has kept himself fully informed and involved through the negotiations which led to the settlement in fulfillment of his role as Representative Plaintiff." As such, Mr. Martin submits he will "fairly and adequately represent the interests of the class."

[52] The proposed Representative Plaintiff is the Plaintiff in this proceeding and has been involved throughout the proceedings to date. Detailed plans for advancing the class proceeding have been produced on this application, including provisions for notifying class members of the existence of this proceeding, and for the holding of hearings in respect to claims that are contested, either as to liability or quantum, for the securing of the assets of the defendant pending determination of entitlement and providing for opting out by any class member wishing to do so.

[53] The settlement stipulates limits on the total financial responsibility of the defendant and on the quantum of damages that any class member may be awarded. As such, by not opting out, each class member agrees to these limitations.

[54] The Representative Plaintiff – including any plaintiff who was a class member – would have an interest in ensuring that the total claims do not exceed the

agreed settlement, so as to avoid any pro-rating of his determined recovery. This "potential conflict" would arise in the case of any of the class members, and, in view of the obvious desirability of having a class member or members as the Representative Plaintiff or Plaintiffs, is not the type of conflict intended by the Legislature to disentitle Mr. Martin from acting as the Representative Plaintiff.

[55] As to the other requirements of s. 7(1)(e), Mr. Martin says the Settlement Agreement accomplishes that which was intended to be achieved by way of certification and a common issues trial. A notice plan has been prepared and submitted to the Court, providing for reasonable steps to bring the fact of the Settlement Agreement to the attention of any members of the class. In the circumstances Mr. Martin is a Representative Plaintiff who satisfies the criteria of ss. 7(1)(e) of the Act.

***Conclusion on the certification application***

[56] The proposed Representative Plaintiff submits that the requirements for certification have been met and that the action should be conditionally certified as a class proceeding pursuant to ss. 6-7 of the *Class Proceedings Act*, in accordance

with the Settlement Agreement. The conditions under s. 7(1) of the Act having been met, subject to the right of the Defendants and class counsel not to proceed with the settlement and certification, the application for certification is granted.

## APPROVAL OF THE SETTLEMENT AGREEMENT

[57] Pursuant to s. 38(1)(a) of the *Class Proceedings Act*, a class proceeding "may be settled or discontinued only with the approval of the court." P.A. Cumming J. summarized several principles relevant to settlement approval in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758, [2005] O.J. No. 1118 (Ont. S.C.J.), at paras. 113-118 (some citations omitted):

> There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval....
>
> To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes....
>
> In general terms, a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone or range of reasonableness":

> ... all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation. [*Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 at 440 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, 3d. ed. (Colorado: Sheppards/McGraw-Hill, 1992), at 11-104.]

A similar standard has been applied in non-class action proceedings in Ontario. The courts recognize that settlements are by their very nature compromises, which need not, and usually do not, satisfy every single concern of every stakeholder. Acceptable settlements may fall within a broad range of upper and lower limits:

> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal. *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230 (H.C.J.).

In determining whether to approve a settlement, a court takes into account factors such as:

> (a) the likelihood of recovery or likelihood of success;
>
> (b) the amount and nature of discovery, evidence or investigation;
>
> (c) the proposed settlement terms and conditions;

(d) the recommendation and experience of counsel;

(e) the future expense and likely duration of litigation;

(f) the recommendation of neutral parties, if any;

(g) the number of objectors and nature of objections;

(h) the presence of arms-length bargaining and the absence of collusion;

(i) the information conveying to the court the dynamics of, and the positions taken by

(j) the parties during the negotiations; and

(k) the degree and nature of communications by counsel and the representative

(l) plaintiff with class members during the litigation.

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 at para. 13 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at paras. 71-72 (S.C.J.).

These factors constitute a guide in the process. It is not necessary that all factors receive the same consideration. In any particular case, certain of the listed factors will have greater significance than others, and weight should be attributed accordingly. *Parsons*, *supra*, at para. 73.

[58] The Plaintiff has made comments on several of the factors referred to in *Vitapharm*, *Dabbs* and *Parsons*.

***Liklihood of recovery or success***

[59] The Plaintiff submits that the Settlement Agreement will eliminate the risk that would be associated with a common issues trial and a contested certification hearing, due to the Defendants' waiver of certain defences, the moderation of the adversarial process, the creation of safeguards for confidentiality and reducing the degree of proof required in some cases. The Plaintiff says the process will be expedited by these measures, and adds that consistency and transparency in the process will be observed by using common experts and a retired judge, as well as by maintaining ongoing obligations to report to class counsel and the Court. The result of the Settlement Agreement not being approved would be a contested certification hearing and, if that is successful, a common issues trial, carrying "substantial risks for both sides," the Plaintiff submits.

***Recommendation and experience of counsel***

[60] The Applicant submits that the Plaintiffs are represented by counsel who have some 45 years litigation experience, including in class actions as well as sexual abuse claims, such as the Residential School Settlement. The Applicant says the evidence before the Court discloses six months of negotiations, including nine days of negotiations in person in the first half of 2009. A judicial settlement conference was conducted on June 30, 2009. The Settlement Agreement was finalized on August 4, 2009. In the Applicant's submission, "[c]ounsel have expended considerable time and effort in the negotiation of this settlement, which negotiations were at arms-length. This settlement is the result of hard bargaining on both sides."

***Litigation risks and expenses***

[61] The Applicant submits that, as Representative Plaintiff, he has placed himself at risk of a substantial adverse costs award, both with respect to certification and as a result of a contested trial of the common issues. He adds that the Defendants' resources "are such that protracted litigation could very well bankrupt the diocese."

***Negotiations and participation of the Representative Plaintiff***

[62] The Representative Plaintiff has been directly involved in the negotiations leading to the Settlement Agreement, including attendance at the judicial settlement conference, and was in regular consultation with class counsel. He and counsel were in communication with members of the class before the action was commenced, and informed the class members of the action and of the progress of the negotiations. He says the indications are that class members support the Settlement Agreement, and indicates that new claimants have come forward as a result of the Phase 1 notice program.

**CONCLUSION**

[63] As previously noted, I am satisfied on the basis of the submissions and evidence that the action meets the criteria for certification pursuant to ss. 6 and 7 of the *Class Proceedings Act*. I am satisfied that the Settlement Agreement constitutes a fair and reasonable settlement that is in the best interests of the Class as a whole and that it provides significant benefits to class members and meets the "range of reasonableness" test. As such, the action is conditionally certified as a

class proceeding and the Settlement Agreement is approved. Also approved is the Phase 2 notice and notice plan for notification of potential class members of the certification and settlement, including their right to opt out.

J.